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NOS. 80-1538 AND 80-1934

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1980

IN RE: ALIEN CHILDREN EDUCATION LITIGATION
STATE OF TEXAS AND TEXAS EDUCATION AGENCY
*Appellants*

VS.

UNITED STATES
*Intervenor-Appellee*

AND

CERTAINED NAMED AND UNNAMED
UNDOCUMENTED ALIEN CHILDREN
*Appellees*

JAMES PLYLER, ET AL.
*Appellants*

VS.

J. AND R. DOE, as Guardian Ad Litem
for I. Doe, ET AL.
*Appellees*

Consolidated Appeals From The United States
Court Of Appeals For The Fifth Circuit

# BRIEF FOR THE APPELLANTS

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## QUESTIONS PRESENTED

1. Whether aliens unlawfully present in the United States are "persons within a state's jurisdiction" as that phrase is used in the equal protection clause of the Fourteenth Amendment.

2. Whether a state is obligated to provide a tuition-free public education to children unlawfully present in the United States.

## PARTIES

The parties are the same as in the court below in each case.

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**Consolidated Appeals From The United States Court Of Appeals For The Fifth Circuit**

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# BRIEF FOR THE APPELLANTS

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These appeals are from orders of the Fifth Circuit entered on June 5, 1981, and February 23, 1981, declaring Section 21.031 of the Texas Education Code to be unconstitutional to the extent that it affects the rights of undocumented alien children to a tuition-free public education. In Re: Alien Children Education Litigation

is a consolidation of numerous suits brought by undocumented aliens against various school districts, the State of Texas and the Texas Education Agency. The United States intervened as a plaintiff. Doe vs. Plyler was brought by the guardian of an alien child against the State of Texas and the Tyler school board. The suits were consolidated on appeal to this Court.

## OPINIONS BELOW

A. *In Re: Alien Children*

The opinion of the District Court for the Southern District of Texas, entered on July 21, 1980, is reported at 501 F.Supp. 544. A copy of that opinion is reproduced in Appellants' jurisdictional statement at pages 17-110.

The Fifth Circuit summarily affirmed the district court on February 23, 1981.

B. *Plyler vs. Doe*

The opinion of the District Court of the Eastern District of Texas, entered on September 14, 1978, is reported at 458 F.Supp. 569. A copy of that opinion is reproduced in Appellants' jurisdictional statement at pages A35-A82.

A permanent injunction was entered by the court on September 14, 1978.

The opinion of the Fifth Circuit issued October 20, 1980, and affirming the district court, is reported at 628 F.2d 448 and reproduced at A1-A32 of the jurisdictional statement.

## JURISDICTION

A. *In Re: Alien Children*

On July 21, 1980, the United States District Court for the Southern District of Texas, Houston Division, issued its memorandum opinion and order in MDL-398 declaring unconstitutional Section 21.031(a)-(c) of the Texas Education Code and enjoining the application of said statute. The district court's jurisdiction was based upon 28 U.S.C. §1343(3) and (4), 42 U.S.C. §1983, 42 U.S.C. §2000d and the opinion of the Judicial Panel on Multidistrict Litigation entered November 16, 1979. 482 F.Supp. 326 (Judicial Panel on Multidistrict Litigation 1979). The matter was appealed to the United States Court of Appeals for the Fifth Circuit, No. 80-1807, which honorable court summarily affirmed the district court on February 23, 1981. Notice of appeal was filed in the Court of Appeals on March 2, 1981. Probable jurisdiction was noted on June 15, 1981.

This Court has jurisdiction pursuant to 28 U.S.C. §1254(2).

B. *Plyler vs. Doe*

On September 14, 1978, the United States District Court for the Eastern District of Texas, Tyler Division, issued a judgment, memorandum opinion and order enjoining officers of the State of Texas from enforcing provisions of Section 21.031 of the Texas Education Code upon Tyler I.S.D. and further enjoined the superintendent and members of the board of trustees of the Tyler I.S.D. from denying admission to alien children unlawfully present in the country. The district court's order was pursuant to 28 U.S.C. §1343(3) and (4) and 42 U.S.C. §1983. The matter was appealed to the United States Court of Appeals for the Fifth Circuit, No. 78-3311, and that honorable court issued its opinion Oc-

tober 20, 1980, 628 F.2d 448, and denied Appellants' motion for rehearing on November 17, 1980. Notice of appeal was filed on December 18, 1980. Probable jurisdiction was noted by this Court on May 4, 1981.

This Court has jurisdiction pursuant to 28 U.S.C. §1254.

These appeals were consolidated by order of the Court on June 15, 1981.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

TEX.EDUC.CODE §21.031 provides in part:

> (a) All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.
>
> (b) Every child in this state who is a citizen of the United States or a legally admitted alien and who is over the age of five years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission.
>
> (c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are

> over five and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian or person having lawful control resides within the school district.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article IV, Section 4, of the United States Constitution provides:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

## STATEMENT OF THE CASE

The problem of illegal immigration into the United States, and specifically into Texas, is acute. The federal government has consistently underbudgeted the INS to the direct detriment of Texas. J.A. B63; C31-2. With 250 officers per shift to patrol the 2,000— mile Mexican border, "you cannot seriously discuss full enforcement of the immigration laws." J.A. C27 (testimony of

Leonel Castillo, former commissioner of INS). "There are fewer border patrolmen on the 2,000 mile border between the United States and Mexico than there are policemen in Dallas, Texas." J.A. D6 (testimony of Mr. Chambers, director, Dallas district INS). Consequently, illegal immigration is "more or less. . . out of control." J.A. A33 (Mr. Chambers). Away from the border the INS concentrates its enforcement capabilities upon illegal aliens holding the best jobs. J.A. B55-6; B59; B62.

A political solution has not been reached by the federal government although recent administrations have made certain suggestions. It is hoped by Appellants that the current administration will succeed in moving toward a solution. However, until a comprehensive federal policy is developed, border states such as Texas will suffer the impact of federal default.

This impact is severely felt in the field of education. Texas' school districts already are dramatically affected by legal immigration. While statewide the number of presumably legal alien students in 1976 was 44,799, or 1.59% of Texas students, 9.6% of the students, or about 27,000 students, in the 61 school districts bordering Mexico were born in Mexico. J.A. B49; B81-3. Some districts have as high as a 27% Mexican alien enrollment. J.A. B106. Twenty-two percent of these students were in their first year in the border districts. J.A. B30. One year later the statewide total was 51,348, or 1.8% of the total enrollment. J.A. B49. Brownsville I.S.D. had 25,600 students in 1979-80. J.A. D5-6. From September, 1979, to February, 1980, over 1,200 students from Mexico were enrolled in addition to the approximately 90% of the 6,000 such students enrolled from 1972 to 1979. J.A. D6; D15.

This influx has seriously affected the quality of education. In Brownsville, 50% of the elementary schools are portable buildings, some dating from World War I. J.A.

D18-19. The facilities are not air-conditioned. J.A. D6. Efforts at obtaining impact aid from the federal government have failed, J.A. D4-5; D16, and these aliens do not significantly add to the tax base of the district. JA B84-5; D21; D24-5; D49.

> A national policy had permitted a flow of immigrants into the country, and a local school district was being penalized for that.

J.A. B84. Neither unpredictably nor unreasonably the Brownsville community

> is totally against any kind of bond issue... People are very well aware of the number of children that are being allowed in from Mexico and a lot of the people are saying, why should we have bond issues to build schools for children from Mexico.

J.A. D8. This was the testimony of Mr. Besterio, superintendent of Brownsville I.S.D. and a Mexican-American. J.A. D2; D32. Eighty-seven percent of the students in his district are Mexican-American. J.A. D25.

While local districts remain responsible for the provision of the capital outlay necessary for facility construction, J.A. B40-1, the state has not been unresponsive to these needs. Beginning with $75 million in 1975 and adding $132 million in 1977 and $100 million in 1979, the state has provided equalization aid to property-poor districts. J.A. D40-1. However, the federal government has not provided *any* funds which may be utilized for basic educational needs; all federal funds are restricted to programs supplemental to basic programs which must first be comparable in state and local expenditure to those programs not assisted by the federal money. J.A. C70-1.

While their problems differ somewhat from the border districts, the large metropolitan school districts in Texas are likewise faced with limited resources.

> [L]arge city schools throughout the United States have been given the challenge of educating the most expensive children with the greatest level of need.

Such children require the expenditure of "five, six, $700 per child . . . ." J.A. D42-3. Of particular significance is the current shortage of bilingual teachers to serve the limited English proficiency lawful residents. For example, in spite of intensive recruiting efforts, Dallas was unable to serve approximately 2,500 of its 8,000 limited English students with a bilingual program. J.A. D33-4. *See, Boe v. Wright,* 648 F.2d at 437.

The impact of admission of illegal aliens is significant. Estimates of the total number of illegal aliens in the United States range up to 12 million. J.A. B13 (3.9 million); B20 (2.7 million); B52 (6 to 8 million and 12 million); B67 (6 million). Estimates for Texas are in the range of 675,000 to one million, conservatively. J.A. B21; B52. Houston I.S.D. was thought to contain 4,210 to 5,625 undocumented children of school age in December, 1977. J.A. B54-5; B67. The district court in *In Re: Alien Children* suggested that the total number of undocumented Mexican school age children in Texas was approximately 20,000. 501 F.Supp. at 577-78.

The record indicates that as many as 99% of these children are Mexican and may be monolingual in Spanish. J.A. A34; B57; E75; E82-3; E92-3. As noted by Mrs. Sally Dysart, the principal of a Dallas school who grew up in Mexico, J.A. E78:

> There are many children—and I know, being a Mexican—that have never been in the schools in Mexico. . . . So you have double trouble.

J.A. E83. Mr. Besterio testified as to education in Matamoras, the Mexican sister city to Brownsville:

> They are trying to do the best job they know how. They are limited in their capacity to build buildings and they have one factor that we don't have and that is they can limit the number of students that come into their school, and that means that, once they are full, they say, 'we have no more room.' So there is a tremendous amount of children that are not going to school because of lack of space in the schools.

J.A. D8. A witness for Appellees testified to studies which show that 55.5% of illegal aliens have had no formal education and another 19.2% had less than a fourth grade education. J.A. C4-6.

One witness testified that illegal aliens are generally lower in educational capabilities than legal immigrants. J.A. B65-6. Others testified that illegal aliens are usually "overaged and oversized," J.A. B72; have cultural differences from native Mexican-American students which cause educational difficulties, J.A. E85-6; are migratory in nature, J.A. D88; E86; E90-2; and present problems due to their fear of discovery, J.A. E85. Present bilingual programs were not designed to meet these children's needs. J.A. E89-90.

Aside from the myriad educational problems presented by illegal alien children, it is crystal clear that their admission into school dilutes the services available to educate disadvantaged lawful Mexican-American residents. The record is clear that illegal aliens concen-

trate in enclaves in areas of concentrated Mexican-American population. J.A. B12-13; B64-5; E81. Thus, illegal immigration most heavily impacts portions of metropolitan areas, J.A. B12-13, and locales along the U.S./Mexico border where the population is predominantly Mexican-American. J.A. B85-6. Federal Title I funds are not sufficient to serve even ⅔ of the eligible population in Texas with compensatory programs. J.A. C74. Illegal aliens further dilute Texas' resources and obviously disrupt bilingual programs in metropolitan areas. J.A. D88-9; E75-6; E81; E87; E89-90; E93-4. Very simply,

> you overcrowd classrooms. You dilute the tax dollars that would normally be in the educational program, and they've got to go to these students too, so the less resources available per child, you're going to get less quality education.

J.A. B85.

The incentive for illegal immigration caused by education is clear. In addition to the testimony of Mrs. Dysart and Mr. Besterio quoted above, the Area Handbook for Mexico discloses that in 1970 primary education in Mexico is "ideally" six years and is divided into three cycles of two years. The schools "attempt to give every child as much knowledge as possible during the first two years *since the majority of pupils never reach the upper cycles*" (emphasis added). J.A. E21. A more recent study, defendants' Exhibit 8-1 (*In Re: Alien Children*), indicates that over 4-½ million children between the ages of 4 and 15 are not in school, about 25% of the total population. Further, the quality of education is often inadequate. Even overcrowded Texas border district schools are rather enticing compared to no school at all.

The testimony clearly recognized that education is an

incentive for family unification. Ms. Marion Houstoun, a witness called by plaintiffs in *Plyler* and co-author of the North-Houstoun study of illegal aliens, J.A. B14, agreed that the illegal aliens would "bring their children in order for the illegal alien children to get education." J.A. B24. Dr. Hensley, a former teacher, principal and program director for elementary education at the Texas Education Agency who conducted a 15-month research project on the Texas border districts, J.A. B81, testified that "one of the prime motivations" for legal immigration is education. J.A. B86. Obviously it is; witness the 6,500 student visas in the Dallas INS district. J.A. E70-1. The testimony of Mr. Estevan Flores, a professor at Pan American University testifying on behalf of the plaintiffs in *In Re: Alien Children* who had conducted a study of illegal aliens in Houston dated March, 1980, J.A. D102-3, provided some specific examples of the effect of the educational incentive, J.A. D104-6, and testified as follows:

> Q. You don't think the Mexican people would like to keep their families together?
>
> A. Yes, they would.
>
> . . .
>
> Q. Let's assume that the ages of the children are school age, and there are some in Mexico, as evidenced by the questionnaire where the gentleman says he has four children in Mexico in school that he wants to bring over here.
>
> A. In the previous questionnaire, yes.
>
> Q. And you don't think that suggests, along with your statement, that the Mexican people would like to keep their families together, that we would try and unify these two groups of

families by bringing them to the United States?

A. We had a few of our respondents say that, yes. The majority did not say that.

Q. Did any of them say, 'I will not bring my children to the United States to unite my family:?'

A. No. We didn't ask that question.

J.A. D106. To belabor the obvious, Superintendent Besterio testified:

There are a number of children in Mexico, without trying to be an expert of any kind, that are not going to school in Mexico and what is to keep them from seeking an education over here?

The Court: Don't they have free public education in Mexico?

A. In a way, but they limit the space and, once they are full, they don't let them in school.

J.A. D12-13; see also, J.A. E74-5. Finally, Mr. James Duderstadt, former teacher and advisor to the commissioner of education in the Virgin Islands, J.A. D94-5, testified to the extreme impact upon education in the Virgin Islands due to the admission of legal and illegal aliens and the attendant incentive for migration. J.A. D96-102.

In fact, the absence of a tuition-free education actually causes some illegal alien children to return to Mexico. Sister Emiliana Cardenas, who teaches illegal alien children in Houston, J.A. C43, testified that she knew "of some children who return to Mexico when they cannot get the education or the instruction they need, the

parents send them back." J.A. C43-4. *See also,* plaintiffs' Exhibit 455 *(In Re: Alien Children).*

Finally, plaintiffs' Exhibit 455 *(In Re: Alien Children)* indicates that education of children causes some illegal aliens to remain in the country.

> Some of the migrants had children living with them in the U.S. who reached school age before the family could return to Mexico; their enrollment in school postponed return migration, at least until the children finish primary or secondary school. In such cases, if the parents do return to Mexico, children who have received most or all of their schooling in the U.S. usually choose to remain here.

*The Future of Mexican Immigrants in California,* Wayne A. Cornelius, March 1980. p. 23.

## SUMMARY OF ARGUMENT

There is no basis for holding that the equal protection clause of the Fourteenth Amendment is applicable to illegal aliens. Such a holding would subvert any orderly solution of a pressing political problem and would cause an unwarranted intrusion into an area reserved to the political branches of government.

If the equal protection clause is nevertheless held applicable, Section 21.031 of the Texas Education Code is constitutional. Education is not a fundamental right of illegal aliens, and such aliens do not constitute a suspect classification. Preservation of the state's resources for the education of its lawful residents and the elimination of an inducement for illegal immigration are sufficient basis for the statute. That the statute serves these purposes is clear. Texas should not be compelled to educate the indeterminate number of alien children who may

enter in order to secure an American education or for purposes of family unification. Otherwise, the state will be required to promote permanent, unlawful immigration.

## ARGUMENT AND AUTHORITIES

1. *Illegal aliens are not within the scope of the equal protection clause.*

While the due process clause of the Fourteenth Amendment has been interpreted to apply to illegal aliens, *Shaughnessey v. United States ex rel. Megei*, 345 U.S. 206 (1953), this Court has never addressed the issue whether the equal protection clause is likewise applicable. Both the language and import of the two clauses fundamentally differ. *See, Mathews v. Diaz*, 426 U.S. 67, 68 (1976). Whereas the due process clause provides procedural protection for whatever rights a person might otherwise possess, the equal protection clause guarantees equal rights to "government benefit[s]." *Doe v. Plyler*, 628 F.2d 448, n.18 (5th Cir. 1980). Neither logic nor precedent warrants the application of the equal protection clause to illegal aliens. Such an extension would inevitably interfere with political decisions reserved to the legislative and administrative branches of government in part by providing inducements for illegal entry. Further, the grant of equal protection rights to illegal aliens would ignore the significance of our national borders and reward persons for violating federal law.

As noted by Judges Reavley and Clark in *Doe v. Wright*, 648 F.2d at 440, this Court has utilized

> consistent and careful language indicating that the term 'person' as used in the equal protection clause of the Fourteenth Amendment 'encompasses *lawfully admitted* resident aliens as

> well as citizens. . . .' *Graham v. Richardson*, 403 U.S. at 371, 91 S.Ct. at 1851 (emphasis added); . . . *Takahashi v. Fish and Game Commission*, 334 U.S. 410, 420, 68 S.Ct. 1138, 1143, 92 L.Ed 1478 (1948) ('[t]he Fourteenth Amendment . . . embod[ies] a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under nondiscriminatory laws') . . .

Citing *Burrafato v. United States Department of State*, 523 F.2d 554 (2d Cir. 1975), *cert. den.*, 424 U.S. 910 (1976), and *Leng May Ma v. Barber*, 357 U.S. 185 (1958), they conclude:

> Therefore, it is conceivable that the Supreme Court might conclude for policy reasons that an alien, who is not lawfully residing in this country, does not constitute a 'person within [a state's] jurisdiction' and, therefore, is not entitled to equal protection of the laws.

648 F.2d at 440.

Indeed, this Court should so conclude. The many cases involving legal resident aliens are inapplicable. Legally admitted aliens are screened prior to entry, are monitored while in the country and can be deported for violation of official rules and regulations. *Hines v. Davidowitz*, 312 U.S. 52, 69-70 (1940). Thus, these aliens stand in a type of contractual relationship with the government. In exchange for obeying the rules and laws, they are entitled to a portion of the nation's resources. An analogy may be drawn to the standards of care applicable in tort law to invitees, licensees and trespassers with citizens, legal aliens and illegal aliens corresponding respectively.

> Neither the overnight visitor . . . nor the illegal entrant can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and some of its guests.

*Mathews v. Diaz*, 426 U.S. 67, 80 (1976).

The other two cases which come closest to the question indicate that illegal aliens are not within the scope of the equal protection clause. In *DeCanas v. Bica*, 424 U.S. 351, 355 (1976), it was unanimously stated that illegal aliens "have no federal rights to employment within the country." Considering the very basic nature of the right to gainful employment, see *Truax v. Raich*, 239 U.S. 33 (1915), and in light of the brief of the petitioners in *DeCanas*, this language clearly implies that the equal protection clause is not applicable to illegal aliens.

*Leng May Ma v. Barber*, 356 U.S. 185 (1957), involved an alien who had been in the country for one and one-half years. This Court held that she was not "within the United States" under 8 U.S.C. §1253(h) since she had not entered the country legally. If an illegal entrant is not "within the United States," he is also not a person within a state's jurisdiction. *See also, Zartarian v. Billings*, 204 U.S. 170, 175 (1907).

The Fifth Circuit, in *Doe v. Plyler*, sought to distinguish *Leng May Ma* on the basis that statutory language was at issue and further that the question therein involved "presence" within the United States. 628 F.2d at 455. However, the English language remains the same whether a statute or consitutional provision is at issue. *See*, U.S.CONST. art. IV, §4. Moreover, the distinction concerning "presence" cuts the other way. "Within its jurisdiction" is more restrictive than merely "within." The additional words "its

jurisdiction" must have meaning. Indeed, Appellees would have a much stronger argument if the equal protection clause terminology was "within a state." *Blake v. McClung*, 172 U.S. 239 (1889).

The application of the equal protection clause to illegal aliens would constitute an intrusion of the judiciary into an area reserved to the political branches of government, for the rights of undocumented or illegal aliens are principally a political question. Wholesale intervention into the area by federal courts under the guise of the equal protection clause would frustrate any cohesive solution to the problem of illegal immigration.[1]

> For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislative or the Executive than to the Judiciary . . .
>
> Any rule of constitutional law that would inhibit the flexibility of the political branches of

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[1]The decisions of the lower courts herein run directly counter to federal interests in preventing inducements for illegal immigration. *See, Preliminary Report of the Domestic Council on Illegal Aliens*, pp. 40, 42, 110 (1976), U.S. Govt. Printing Office: 1977 0-241-089/1020; Plaintiff-Intervenor Ex. 47 (*In re: Alien Children)* (recommending denial of benefits to avoid inducement). Further, the lower court decisions require Texas school officials to violate 8 U.S.C. §1324 by harboring illegal aliens and inducing their entry.

> government to respond to changing world conditions should be adopted only with the greatest caution.

*Mathews v. Diaz*, 426 U.S. 67, 81 (1976); see, *Kleindienst v. Manedel*, 408 U.S. 753, 766-67 (1972).

However ineptly the federal government has acted in direct furtherance of its statutory policy of exclusion, it is clear that it does not intend to provide social benefits to persons who violate federal law in this regard. Federal regulations currently prohibit states from providing undocumented aliens with food stamps, 7 C.F.R. §273.4, and Aid to Families With Dependent Children, 45 C.F.R. §233.50. The latter regulation is applicable also to Aid to the Blind, Aid to Permanently and Totally Disabled, and Supplemental Security Income. *See also*, 42 U.S.C. §1382c(a)(1)(B). Further, federal law restricts the entitlement of undocumented aliens to medicare, 42 U.S.C. §1395i-2, 42 C.F.R. §405.205(b); medicaid, 42 U.S.C. §1395o, 42 C.F.R. §405.103(a)4(ii); and, under some circumstances, social security benefits, 42 U.S.C. §426a(a)(4).

Indeed, there are clear indications that Congress intends to protect state resources in the very area at issue here, education. The legislative history of the Immigration and Naturalization Act reveals congressional recognition of the burdens which excessive immigration places on domestic social institutions. Congress noted that excessive admission of aliens would "unduly charge our institutions for the care of the socially inadequate." [1952] U.S. Code Cong. & Ad. News 1672. Similarly, an argument against the increase of lawfully admitted aliens in a 1965 amendment was the "increasing shortage of educational institutions on the primary, secondary, and college levels." [1965] U.S. Code Cong. & Ad. News 3349.

Congress has been especially attentive to the impact of legal aliens on this country's educational institutions. Congress has enacted a special program to deal with legal alien students. *See*, 8 U.S.C. §1101(15)(5). In so doing, the federal government has carefully avoided any infringement upon the rights of educational entities to control their student populations. Pursuant to 8 C.F.R. §214.2(f), an alien student is not eligible for admission to the United States without a form from the pertinent school indicating that he has been accepted for a full course of study. Congress has reviewed the question of impact upon "the educational opportunities of our own citizens" in order to determine whether a limit should be placed on student visas. S.Rep.No. 1515, 81st Cong., 2d Sess. 507-9. Having shown such solicitude for the preservation of ample educational resources for lawful residents, Congress surely did not intend to frustrate that goal by requiring the states to expend their limited educational funds on illegal aliens who have not complied with the student visa program and are residing in the states in contravention of all federal immigration laws and policies. In fact, the obvious implications from the existing student visa program is that only those students who comply with its terms should be admitted to schools.

The purpose and objective of immigration regulation is obviously to prevent illegal entry by persons who have not received visas. The cause for illegal immigration is an "international push-pull." Domestic Council, p. 40. While employment is the main pull factor, "social and demographic factors such as educational facilities ... are involved." Domestic Council, p. 40. The lure of employment "is enhanced by better opportunity for schooling and training for [aliens] and their children. ..." Domestic Council, p. 42. The Domestic Council has recommended that disincentives be adopted in order to remove some of the "pull." Specifically, the Council recommended that "various benefits" be denied "to per-

sons who clearly act in circumvention of the law." p. 110. This Court has recognized the rather fundamental principle that social services should be available only to lawful residents, noting, with reference to medicaid, "surely Congress would at least require the aliens' entry be lawful." *Mathews v. Diaz*, 426 U.S. at 82.

The judiciary is not the proper branch of government to decide what resources should be dedicated to illegal aliens or what services provide undesirable incentives for illegal immigration. The force of the Fourteenth Amendment is such that not even Congress could alter any determination of policy made by the courts. *Doe v. Plyler*, 628 F.2d at 453, n. 11. Illegal aliens having entered the country by virtue of the default of the legislative and administrative branches of the federal government in the performance of their constitutional obligations to the states, such aliens are in many respects wards of the federal government. Whether and under what circumstances they are allowed to remain are political questions. Congress having failed to even attempt to require states to provide benefits such as education to illegal aliens, the courts should not interfere with this determination. This conclusion is buttressed by the observation that the application of the equal protection clause would mandate states to provide services which Congress has expressly denied to illegal aliens. *C.f., Buckley v. Valeo*, 424 U.S. 1, 93 (1976).

U.S.CONST. art. IV, §4, provides: "The United States . . . shall protect each [state] against invasion ...." It is illogical to contend that the same fundamental charter which obligates the Union to protect Texas from invasion of illegal aliens also compels Texas to suffer the consequences of the default in execution of that obligation. It would be specious to argue that the Fourteenth Amendment, at the time it was ratified, was understood to apply to illegal aliens for there were no such aliens in existence at the time. *Kleindienst v. Mandel*, 408 U.S.

at 61. The states having signed on pursuant to an express promise of protection from invasion by the federal government, it is evident that the states did not commit themselves to the provision of benefits to the invaders.

As stated by Mr. James Pete Williams, a desegregation expert who has served many federal courts in that capacity (J.A. D77-8):

> I'm 51 years old, and all my life to me the vision of the Statute of Liberty is one literally of what I have read in the inscription looking at it face to face, send us all, send us everything, the poor, the weak, whatever, we'll take care of it. Those days are finished. That's over with. We have arrived at a point in American history where we can no longer sustain that. We cannot take the dissident populations from any country. McDade County in Florida is a gigantic example of educational problems because we took the problems that presumably, I'm just paraphrasing here, that possibly Castro is delighted not to have to cope with.
>
> . . .
>
> We have arrived at that point. It's finished. We can no longer sustain the reception of any group of people in this country. We've got to stop and breathe and plan how we're going to preserve a workable system before the inner cities of Houston, the inner cities of Cleveland, the inner cities of Dallas fall down upon us.

J.A. D85-6.

Distinctions between legal and illegal residency should not be obliterated and national borders and federal immigration law rendered meaningless. The

equal protection clause should not be held applicable to illegal aliens. Obviously, an alien living in Mexico has no equal protection rights. *Cf., Kleindeinst v. Mandel*, 408 U.S. at 62. He should not be afforded such due to his violation of federal law.

> To give him rights due to his unlawful presence greater than those he would have had if he had not come to this country, would be the worse sort of bootstrapping and would encourage aliens to enter this country surrepticiously.

*Burrafato v. United States Department of State*, 523 F.2d 554, 557 (2d Cir. 1975), *cert. den.*, 424 U.S. 910 (1976).

The proper scope of judicial review of a state classification concerning illegal aliens is that expressed in *DeCanas v. Bica, supra.* It is far more sound in this area to limit the question to one of whether a state statute is preempted by federal immigration law, a question resolved in Appellants' favor below. *Doe v. Plyler*, 648 F.2d at 453; *In Re: Alien Children Education Litigation*, 501 F.Supp. 544, 588 (S.D.Tex. 1980). In this manner, political and economic issues may be resolved in the forums constitutionally prescribed for consideration of such questions. Particularly in the context of social services, the scope of the equal protection clause of the Fourteenth Amendment should be limited to persons *legally* present in the country.

2. *Assuming the applicability of the equal protection clause, Section 21.031 is nevertheless constitutional.*

The principle justifications for Section 21.031 are protection of resources and the prevention of incentives for illegal immigration of school-age children. Since education is not a fundamental right of illegal aliens and since illegal aliens do not constitute a suspect classification,

Section 21.031 must be held constitutional so long as "any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 426 (1961); quoted in *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

Even in general terms, there is no fundamental right to a tuition-free education. *Ambach v. Norwick*, 441 U.S. 68, 77, n. 7 (1979); *San Antonio Independent School District v. Rodriguez*, 431 F.Supp. 231 (E.D.Tex. 1977) (three-judge court); *Montgomery v. Douglas*, 388 F.Supp. 1139 (D.Colo. 1973) (three-judge court), *aff'd*, 422 U.S. 1030 (1975); *Hernandez v. Houston Independent School District*, 558 S.W.2d 121 (Tex.Civ.App. -Austin 1977, writ ref'd n.r.e.).

The holding of the district court to the contrary *In Re: Alien Children Education Litigation*, 501 F.Supp. at 564, not only ignores the rulings of this and other courts but fails to recognize that many of the reasons advanced for the importance of education are inapplicable to illegal aliens who have no right to participate in the democratic process. *See generally, Ambach v. Norwick*, 441 U.S. at 76-78; *Boe v. Wright*, 648 F.2d at 436-37.

Furthermore, the holding in *DeCanas v. Bica, supra*, is a direct indication that illegal aliens have no fundamental rights under the United States Constitution. As stated in *Truax v. Raich*, 239 U.S 33, 41 (1915):

> It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [14th] Amendment to secure.

*See also, Examining Board v. Flores de Otero*, 426 U.S. 572 (1976); *Smith v. Texas*, 233 U.S. 630 (1914). However, illegal aliens "have no federal right to employ-

ment within the country." *DeCanas*, 424 U.S. at 355. It borders on the ludicrous to suggest that illegal aliens have a fundamental right to a tuition-free education but *no* right, fundamental or otherwise, to implement that education through gainful employment.

Nor can illegal aliens legitimately be deemed a suspect class. Aliens lawfully residing in this country constitute a suspect class in some, but not all, circumstances. Compare *Foley v. Connelie*, 435 U.S. 291 (1978), with *Nyquist v. Mauclet*, 432 U.S. 1 (1977); *Graham v. Richardson*, 403 U.S. 365 (1971). However, "the common thread running through" the cases involving aliens "is that they refer to 'lawfully resident' aliens." *Alonso v. California*, 123 Cal.Rptr. 536, 540 (Dist.Ct.App. 1975). The rationale underlying the court's decisions regarding legal aliens is totally inapplicable to this case. The court has analyzed the cases in which restrictions upon legal aliens have been held unconstitutional as follows:

> These exclusions struck at the non-citizens' abililty to exist in the community, a position seemingly inconsistent with the congressional determination to admit the alien to permanent residence.

*Foley v. Connelie*, 435 U.S. at 295. There is no inconsistency in legislation directed at illegal aliens; it is entirely consistent with the congressional determination to exclude the aliens from admission.

The denomination of illegal aliens as a suspect class would magnify the unwarranted judicial intrusion into this area attendant to a holding that the equal protection clause is applicable at all. As noted in *Hernandez v. Houston Independent School District*, 558 S.W.2d at 124, "the status of an illegal alien is hardly an unalterable or unchangeable one." *See, University of*

*California Regents v. Bakke*, 438 U.S. 265, 360 (1978), Justice Brennan. In effect, illegal aliens "have chosen to classify themselves." *Ambach v. Norwick*, 441 U.S. at 80. Federal law may be observed at any time. It is almost bizarre to suggest that one may gain preferential constitutional status over the great majority of our citizens by illegally entering the country. While the question was not expressly addressed in *DeCanas v. Bica, supra*, it seems clear that the result therein could not have been reached had illegal aliens been considered a suspect class.

In their discussion of the appropriate level of scrutiny, the district courts confused a challenge to Section 21.031 with a challenge to the policy of allowing illegal alien children to attend school upon payment of tuition. The statute in no way draws a distinction based upon wealth; its classification is one of legal residence. It is silent with respect to admission upon payment of tuition. Thus, the suggestion of the lower courts that strict scrutiny is appropriate because of discrimination against the poor is inapplicable to Section 21.031.

Accordingly, Section 21.031 should be reviewed under the rational basis standard. However, the state has articulated sufficient basis for Section 21.031 to be upheld regardless of the standard of review. The preservation of the state's limited educational resources and the dedication thereof to lawful residents constitute vitally important state interests. *See, Ambach v. Norwick*, 441 U.S. at 76-77. The related goal of reducing incentives for illegal immigration which drains these resources is likewise compelling. The decision of the panel in *Doe v. Plyler* is clearly in error in this regard. The intolerance of the court for the position of the Appellants may well have rested mostly upon the "harsh results" it saw attendant to a contrary ruling. 628 F.2d at 451. However, "the undisputed importance of education will not alone cause this Court to depart from the usual stan-

dard for reviewing a state's social and economic legislation." *San Antonio Independent School District v. Rodriguez*, 411 U.S. at 35.

The preservation of the state's limited resources for education of its lawful residents is clearly a legitimate state interest.

> Cost of a government funded program is a legitimate governmental interest.
>
> . . .It is the State's interest in providing universal education, consistent with the historical policies underlying the establishment of publicly funded education in this country, while at the same time preserving its limited resources from unwarranted dilution. The major governmental policy interest behind the free public education movement in this country during the 19th century was that an enlightened electorate is necessary to maintain our democratic form of government and to preserve the liberty of the people. (Citations omitted.)
>
> . . .
>
> I conceive that the Texas Legislature, on agreeing that education is 'the very foundation of good citizenship,' could reasonably have concluded that it should not dilute its limited resources by providing free public education to illegal alien children, who can never—absent some form of amnesty—become citizens, exercise the franchise, or serve in the armed forces of the United States.

*Boe v. Wright*, 648 F.2d at 435-36. In *Nyquist v. Mauclet*, 432 U.S. 1 (1977), this Court stated:

> although such education is a laudable objective, it hardly would be frustrated by including *resident aliens* [i.e. those lawfully residing in this country], as well as citizens, in the State's assistance programs.

*Id.* at 11.

> The implication of the Court's statement is that including illegal aliens in a state's educational assistance programs might indeed frustrate the state's objective of the enhancement of the educational level of the electorate.
>
> Texas' interest in educating the electorate is clearly frustrated in this case. The record reveals that DISD has a total enrollment of 120,000 students and that the district is presently facing an enrollment of 8,700 Spanish-speaking students requiring bilingual education. DISD is already short of bilingual teachers and faces a problem of recruiting qualified bilingual teachers. With the projected enrollment of 2,000 to 5,000 illegal alien children from Mexico during the school year, the quality of education for Spanish-speaking citizens and legal resident aliens, who require bilingual education, will certainly decline. I conclude that §21.031 is rationally related to Texas' interest in educating the electorate in avoiding a diminution of the quality of such education.

*Boe v. Wright*, 648 F.2d at 437

Indeed, the record in these consolidated cases clearly establishes the adverse impact of illegal alien children upon the state's educational system. Further, the evidence herein directly rebuts the viability in this con-

text of the language quoted above from *Nyquist v. Mauclet*. Federal immigration policy already has seriously affected the quality of education in some areas of Texas and is partially responsible for the state's substantial alteration of its school financing. The admission of illegal aliens merely makes a difficult situation worse.

The irony of the state's and school district's predicament and one distinction between illegal and legal residents is that even were Appellants to succeed in adequately educating an illegal alien, he would then either be unable to secure employment commensurate with his abilities, see, e.g., *DeCanas*, or would run afoul of the federal government's selective enforcement of immigration laws. A well educated illegal alien would find himself at the top of the list for deportation. This result illustrates one basic rationale of the statute—illegal residents may be deported at any time. The state has a compelling interest in the education of its lawful residents, particularly those who are presently disadvantaged. It need not jeopardize its efforts in this regard by dedicating its limited resources to the education of children who are difficult to educate adequately and who in all likelihood would not return the benefits gained to state or national society. Clearly, Section 21.031 increases "the likelihood that [educational expenditures would be of benefit] inside the United States." *Califano v. Aznavorjan*, 439 U.S. 170, 178 (1978); see *Nyquist v. Mauclet*, 432 U.S. at 14 (Burger, D.J., dissenting).

> The Constitution does not empower the Court to second-guess officials charged with the difficult responsibility of allocating limited public [education] funds among the myriad of potential recipients.

*Dandridge v. Williams*, 397 U.S at 487.

The second principal justification for Section 21.031 is prevention of inducements for illegal entry. The panel in *Doe v. Plyler* stated that it had "serious doubt [of] its [21.031] exclusionary motive" because Texas had not enacted an employer sanction law and concluded that 21.031 was not rationally related to this goal because it was an "ineffectual means of discouraging illegal migration" since only a small percentage of illegal aliens bring their children into the country. 628 F.2d at 460-61. The district court in *In Re: Alien Children* adopted similar reasoning but began with the proposition that such a basis was impermissible, the matter being exclusively a federal concern. 501 F.Supp. at 578.

The weakness in these approaches is evident. While it is undisputed that the majority of illegal aliens are single men seeking employment, the lower courts overlooked the fact that Section 21.031 was intended to keep it that way. Illegal aliens who enter without their families, stay an average of 5.5 months, 501 F.Supp. at 578, n. 83, and return to Mexico do not cause the drain on educational resources or the sociological impact implicit in the illegal immigration of entire families. There is

> nothing irrational about Texas' desire to lessen the incentive for whole alien families to enter this country illegally since it is reasonable to assume aliens who bring their families would be less transient than most illegal aliens and would attempt to establish permanent, albeit illegal, residences in this country.

*Boe v. Wright*, 648 F.2d at 438, n. 9. While the district courts found that the statute was not an effective means of preventing illegal entry and residence, such an inquiry misses the point for "the efficacy of legislation is not the province of the judiciary." *Boe v. Wright*, 648 F.2d at 438.

Moreover, the lower courts ignored both common sense and the record set forth above in reaching these findings. One need only to look at a map and see the concentration of population on both sides of the Texas-Mexico border and be even remotely familiar with Mexico to realize that an American education and the attendant acquisition of English are significant drawing cards both for border-hopping attendance and for familial migration.

> Can it be denied that free education is an incentive to move across the Rio Grande? *Cf. Graham v. Richardson*, 403 U.S. 365, 376-80.

*Boe v. Wright*, 648 F.2d at 439. It cannot.

It is evident that Section 21.031 is rationally related to the goal of exclusion. The suggestion of lower courts that Texas' motive was questionable in the absence of an anti-employment statute not only is immaterial, *Hughes v. Alexandria Scraps Corp.*, 426 U.S. 794 (1976), but reflects a rationale whereby the federal government would be found disinterested in the enforcement of its immigration laws since it has also failed to enact anti-employment legislation. Apparently the lower courts did not understand the complexities of the issue of an anti-employment statute, legislation opposed by MALDEF. J.A. D94; defendants' Exhibit 14-26 (*In Re: Alien Children. See, Illegal Aliens: Analysis and Background*, p. 578, 95th Cong., 1st Sess., June, 1977. Further, Texas may constitutionally elect to retard illegal immigration by aligning state policy with Congress' exclusionary intent rather than by regulating the private sector. *Boe v. Wright*, 648 F.2d at 439.

Finally, the holding of the district court in *In Re: Alien Children* that Texas could not permissibly assert an exclusionary interest must be rejected. *Boe v.*

*Wright*, 648 F.2d at 438, n. 1. The differentiation between permissible state and federal interests expressed in *Mathews v. Diaz, supra*, and *Nyquist v. Mauclet*, 432 U.S. 1 (1977), is not applicable to aliens whose presence is not authorized by federal law. The source of the exclusive federal power to control immigration being implied, *The Chinese Exclusion Case*, 130 U.S. 581, 604 (1889), that power cannot be construed to justify the assertion of interests by the federal government where those interests are denied to states unless the assertion of such interests by a state conflicts with the "determination to admit [an] alien..." *Folley v. Connelie*, 435 U.S. 291, 295 (1978); U.S.CONST., Tenth Amendment.

## CONCLUSION

Section 21.031 is constitutional. Evaluation of its wisdom is a legislative rather than judicial responsibility. If Congress believes that the attendant incentives for illegal immigration of children are outweighed by other factors and that the education of illegal aliens is a desirable dedication of *its* resources, it is free to act.

> All I know is just as a simple old lawyer that the federal government hasn't so far as I can tell thrown its weight around fiscally with respect to this situation.

J.A. D57 (Professor Covey T. Oliver).

> Everybody is waiting for George to solve the problem. To me, it's a federal problem whether Irish, white or black or from Cuba. They should be educated, apparently, in a federal system that's to be established to take care of the federal problem, or they should be sent home.

J.A. D87 (Mr. James Pete Williams). The problem is political; so must be the solution. The federal judiciary should not take the reins from Congress' hands. Texas should not be forced to open its schools to the indeterminate number of Mexican children who may cross the border seeking education and family unity. When this Court held that states had no power to physically control immigration, it necessarily placed the responsibility for protection of the states in the hands of the federal government. Six years have passed since the enactment of Section 21.031 and not a murmur has been heard from Congress. Congress must decide whether these children "should be educated...or...sent home."

Texas has no desire to increase its population of disadvantaged residents to the detriment of those lawfully present which is the inevitable result of the lower court's rulings. It is especially reluctant to do so in the absence of any indication that Congress desires the provision of the benefit of education and a concomitant dedication of federal resources to the problem caused by federal default. It cannot plausibly be argued that education is any more important to a child than life itself which may be denied by federal restrictions upon medicare, or than proper nutrition which may be denied by federal restrictions on AFDC and food stamps. In fact, Section 21.031 is far more rationally related to the basis set forth herein than *any* of the federal restrictions are to any conceivable basis. Since "equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment," *Buckley v. Valeo*, 424 U.S. at 93, Section 21.031 of the Texas Education Code is constitutional.

Respectfully submitted,

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